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No. 90-585

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD E. WILLIAMS, COMMISSIONER OF THE DEPARTMENT OF MOTOR VEHICLES, COMMONWEALTH OF VIRGINIA,

and

VIRGINIA AUTOMOBILE DEALERS ASSOCIATION, INC., PETITIONERS

v.

SATURN DISTRIBUTION CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act allows states to burden the formation of arbitration agreements with requirements that do not apply to the formation of contracts generally.

2. Whether a state may circumvent the Federal Arbitration Act's prohibition against placing arbitration agreements on a different footing from other contracts by adopting a rule that, while not expressly mentioning arbitration, admittedly subjects arbitration provisions to burdens not applicable to contracts generally.

3. Whether the Dealer's Day In Court Act, which gives automobile dealers a cause of action against manufacturers that have not acted in good faith, constitutes an express indication of congressional intent to allow states to place disparate burdens on the formation of arbitration agreements in automobile franchise contracts.

4. Whether it is appropriate to assume in advance that arbitration agreements in automobile franchise contracts will enable manufacturers to deprive dealers of the substantive protections of state law and will prevent state enforcement officials from overseeing the dealer/manufacturer relationship.

RULE 29.1 STATEMENT

Respondent Saturn Distribution Corporation is a wholly-owned subsidiary of Saturn Corporation, which, in turn, is a wholly-owned subsidiary of General Motors Corporation.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. The Saturn Dealer Agreement

Respondent Saturn Distribution Corporation and its parent company, Saturn Corporation, (hereinafter collectively referred to as "Saturn") were created in 1985 to design, manufacture, and market motor vehicles under the Saturn nameplate. Saturn's specific mission is to "market vehicles developed and manufactured in the United States that are world leaders in quality, cost and customer satisfaction through the

integration of people, technology and business systems." C.A. App. 20.[1]

Saturn has concluded that in order to become an effective competitor in the automobile market, it must maintain a relationship with its dealers that is based upon cooperation, mutual commitment, and shared responsibility. See Pet. App. A-29; C.A. App. 20-21. To implement this philosophy, Saturn—in conjunction with a team of 16 dealers, who together own more than 80 automobile franchises—concluded that a dispute resolution mechanism that eschews adversarial judicial proceedings should be a core element of Saturn's Dealer Agreement. Pet. App. A-3; C.A. App. 105-106. Saturn and the dealers agreed that nonjudicial dispute resolution would enhance the goal of mutual decisionmaking, while representing a significant savings of time and money for both Saturn and its dealers. C.A. App. 22, 106-108. They anticipated that these economies ultimately would inure to the benefit of the consumers of Saturn products. *Id.* at 108.

Having decided to make alternative dispute resolution an essential component of the Dealer Agreement, Saturn and the team of dealers set about to design a dispute resolution mechanism that would maximize the goals of mutual commitment and cooperation while remaining fair to all parties. C.A. App. 106-108. The dealers and Saturn focused upon two key variables: the method of decisionmaking and the nature of the decisionmakers. As to the method of decisionmaking, they concluded that decisionmaking by consensus, rather than majority vote, would be

[1] "C.A. App." refers to the joint appendix submitted to the court of appeals.

more likely to result in mutually-acceptable solutions that would foster healthy long-term relationships between Saturn and its dealers. *Id.* at 107. As to the nature of the decisionmakers, they concluded that it would be preferable to utilize members of the Saturn distribution network, who would have a unique knowledge of the Saturn system as well as a stake in the enterprise's long-term success, rather than outside arbitrators with no particular knowledge of the Saturn philosophy. *Id.* at 106-107.

Accordingly, Saturn and the dealers jointly designed a dispute resolution mechanism that emphasizes consensus decisionmaking by members of the Saturn family. The process begins with either Saturn or a dealer filing a request for mediation. Pet. App. A-3 n.1. The dispute is then forwarded to a mediation panel, which is required to recommend a consensus solution. *Id.* at A-3 to A-4 n.1. If either party rejects the mediated solution, or if both parties choose to waive mediation, they may proceed to binding arbitration. *Id.* at A-4 n.1. The arbitration process provides for document discovery and a hearing, which is designed to give each party "a full opportunity to present its position." C.A. App. 50. The arbitration panel is required to reach a consensus decision. Pet. App. A-4 n.1. That decision is final and unappealable, except as otherwise provided by the Federal Arbitration Act. *Ibid.*

Mediation and arbitration panels are composed of two dealers and two Saturn representatives, who are selected at random from a pool consisting of 10 dealers and 10 company representatives. Pet. App. A-4 n.1; C.A. App. 21-22, 44-45, 107. The dispute resolution process provides for the removal of prospective panel members peremptorily and for cause. C.A.

App. 45-46, 107. These safeguards are designed to eliminate not just the existence but also the appearance of partiality.

Significantly, Saturn's dispute resolution provisions prescribe only the forum in which disputes between Saturn and its dealers must be resolved, not the substantive standards to be applied in that forum. Accordingly, these provisions in no way abrogate the substantive rights of the parties under either state or federal law. C.A. App. 108-109. Moreover, Saturn cannot unilaterally impose its Dealer Agreement and dispute resolution mechanism upon unwilling dealers. This is not a situation in which dealers have already committed resources to becoming Saturn franchisees and thus are forced to accept whatever terms Saturn dictates. To the contrary, because Saturn is a new company, all franchise relationships will be new relationships. Pet. App. A-16 n.6. The Saturn Dealer Agreement is simply an additional option for prospective franchisees, who face no economic pressure to enter into franchise agreements that they deem to be undesirable. *Id.* at A-18; C.A. App. 109.

B. Saturn's Efforts To Obtain Approval Of Its Dealer Agreement In Virginia

Virginia law requires automobile manufacturers to submit their standard dealer agreement forms to the Commissioner of Motor Vehicles for approval before those agreements can be used in Virginia. See Va. Code Ann. § 46.1-550.5:24.[2] Pursuant to this requirement, Saturn submitted its Dealer Agreement

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[2] Like petitioners, we will refer to sections of the Motor Vehicle Dealer Licensing Act by their designations at the time the case was decided by the district court. See Pet. 2 n.1.

form to petitioner Williams, who rejected the Agreement because of its mandatory alternative dispute resolution provision. Pet. App. A-4. Petitioner Williams made clear to Saturn that under Va. Code Ann. § 46.1-550.5:27, which prohibits provisions that deny dealers access to the state forums,[3] he would not approve the Agreement unless Saturn altered it to provide "an option for the dealer to choose binding arbitration * * * or to choose the forum provided under Virginia's dealer franchise laws." See C.A. App. 83-84.

Thus, according to the Commissioner, Saturn cannot set up a dealership network in the Commonwealth of Virginia unless it abandons the uniform compulsory arbitration mechanism that is a central part of its standard dealership agreement throughout the United States. Saturn may offer its dispute resolution provision as an option but may not insist that prospective dealers agree to it. If a prospective dealer satisfies Saturn's criteria for being offered a franchise, Saturn *must* award that dealer a fran-

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[3] Section 46.1-550.5:27 provides in relevant part:

> It is unlawful for any manufacturer, factory branch, distributor or distributor branch, or any field representative, officer, agent or any representative whatsoever of any of them:
>
> * * * *
>
> 10. To fail to include in any franchise with a motor vehicle dealer the following language: "If any provision herein contravenes the valid laws or regulations of any state or other jurisdiction wherein this agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be deemed to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force and effect," or words to that effect.

chise even if the dealer is unwilling to resolve future franchise-related disputes by arbitration. In sum, in order to do business with Virginia dealers who want to arbitrate future disputes, Saturn has to be willing to do business with dealers who do not want to arbitrate future disputes.

C. The Proceedings Below

After it became clear that the Commissioner would not permit Saturn to do business in Virginia only with dealers willing to accept the mandatory arbitration term in the Dealer Agreement, Saturn filed this action against the Commissioner in the United States District Court for the Eastern District of Virginia. The complaint alleged that Section 46.1-550.5:27(10) of the Motor Vehicle Dealer Licensing Act, as interpreted by the Commissioner, is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* It sought a declaration that the provisions of the Saturn Dealer Agreement relating to arbitration are valid and enforceable in Virginia and an injunction prohibiting the Commissioner from taking any action to prohibit or discourage use of the provisions in contracts between Saturn and its dealers.

The district court granted summary judgment in favor of petitioners. The court acknowledged that the FAA applies both to laws that render executed arbitration agreements unenforceable and to laws like the Virginia statute that regulate the formation of arbitration agreements. Pet. App. A-33, A-38 to A-39. It stated: "[C]ommon sense dictates that a state should not be able to escape its enforcement duties under [the FAA] by banning the formation of arbitration agreements." *Id.* at A-33. The court nonetheless held that the FAA does not preempt the

Motor Vehicle Dealer Licensing Act because "[t]he Virginia statute does not subject arbitration clauses to burdens not felt by other types of contracts." *Id.* at A-34. The court based this conclusion on a handful of Virginia laws that "dictate the form of certain types of contracts, with no opportunity whatsoever for negotiation." *Id.* at A-35.

The court of appeals reversed and granted summary judgment in favor of Saturn. Like the district court, the court of appeals rejected petitioners' argument that the FAA's preemptive scope does not extend to laws that burden the formation of arbitration agreements. The court explained:

> It is clear that a state may not refuse to enforce and may not revoke an existing arbitration agreement on the ground that the contract did not comply with rules of contract formation applicable only to arbitration provisions. It is likewise clear that in passing the FAA, Congress intended to *foreclose* state legislative attempts to undercut the enforceability of arbitration agreements. To restrict the FAA to existing agreements would be to allow states to wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts. The FAA does not allow a state legislature to circumvent Congressional intent by enacting special rules to discourage or prohibit the formation of agreements to arbitrate.

Pet. App. A-8 to A-9 (internal quotation marks and citations omitted; emphasis in original).

The court of appeals went on to hold that Section 46.1-550.5:27(10) of the Motor Vehicle Dealer Licensing Act is preempted by the FAA because it imposes burdens on the formation of arbitration agree-

ments not found in Virginia's general law of contracts. The court observed:

> If Virginia uniformly barred the formation of nonnegotiable contractual terms or declared all contracts of adhesion to be presumptively unenforceable, then the statute at issue would not be at odds with general contract law. However, as a general rule, Virginia does not bar parties from making certain provisions of their contracts nonnegotiable. In fact, *no other Virginia statute requires that a nonnegotiable provision in a standardized contract be made optional.* In addition, Virginia does not always, or even usually, presume adhesive contracts to be unenforceable.

Pet. App. A-15 (citation and footnote omitted; emphasis added).

The court of appeals rejected the district court's conclusion that a state law burdening arbitration is not preempted so long as the state has some other statutes that forbid or burden a few other contractual terms. Pet. App. A-15 n.5. It also dismissed petitioners' argument that the Licensing Act does not single out arbitration because it applies to all forum-selection clauses in automobile franchise agreements, explaining:

> [T]he mere fact that a statute or regulation does not expressly refer to arbitration is not determinative on the question of whether it impermissibly singles out arbitration provisions. In *Southland Corp. v. Keating*, [465 U.S. 1 (1984)], the Supreme Court held that a California franchise statute which did not expressly refer to arbitration, but which voided any term that

> waived its protections, was preempted to the extent that it had the effect of prohibiting arbitration provisions.

Id. at A-12 to A-13. Finally, the court rejected petitioners' argument that prohibiting mandatory arbitration agreements is necessary to prevent manufacturers from depriving dealers of the substantive protections of state law, stating:

> [T]he FAA simply does not permit a state to legislate policy concerns in such a way as to thwart Congress' intent to place arbitration agreements on equal footing with other contracts. The argument that the Virginia statute is a necessary part of the state's scheme to protect dealers must therefore fail. * * *
>
> The Commissioner's fears that Saturn's arbitration provisions will be used to force dealers to waive the protections given to them by Virginia law are premature. Existing Virginia law can and should be applied to revoke *any* contract which results from fraud or the sort of *overwhelming* economic power which can render an agreement unconscionable.

Id. at A-18 to A-19 (emphasis in original).

REASONS FOR DENYING THE PETITION

There is no reason to grant the petition for certiorari in this case. Petitioners do not contend that the court of appeals' decision is inconsistent with any decision of this Court, nor do they even allege that it is in conflict with the decision of any lower court. To the contrary, the Fourth Circuit's ruling is fully consistent with—and indeed was plainly compelled by —this Court's numerous decisions interpreting the Federal Arbitration Act, particularly *Perry* v. *Thomas*, 482 U.S. 483 (1987), and *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). In both of those cases, the Court made clear that the FAA preempts state laws, such as the Virginia Motor Vehicle Dealer Licensing Act, that treat arbitration provisions less favorably than the state's general contract law treats other contractual terms.

Just last Term, the Court denied review in a case virtually identical to the decision below. In *Securities Indus. Ass'n* v. *Connolly*, 883 F.2d 1114 (1st Cir. 1989), cert. denied, 110 S. Ct. 2559 (1990), the Commonwealth of Massachusetts filed a certiorari petition making essentially the same arguments that petitioners make here. In an *amicus curiae* brief filed at the Court's request, the Solicitor General analyzed these arguments and, contrary to petitioners' suggestions (Pet. 19-20 & n.11), found them wholly without merit. Nothing has changed in the six months since certiorari was denied in *Connolly* to warrant a different result in this case.

1. Petitioners' principal argument is that the FAA applies only to executed arbitration agreements, not to state efforts to burden the formation of such agreements. See Pet. 9-14. This argument is utterly lacking in legal or logical support.

a. All four courts in which the issue was squarely presented have rejected petitioners' argument. Specifically, it was rejected by both courts below, Pet. App. A-8 to A-9, A-33, A-38 to A-39, and by both the court of appeals and the district court in *Connolly*, 883 F.2d at 1123-1124; 703 F. Supp. 146, 151 (D. Mass. 1988). Moreover, in cases involving executed arbitration agreements, the federal courts repeatedly —and without exception—have held that the FAA preempts state law requirements for the formation of arbitration agreements that do not apply to contracts generally.[4]

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[4] See, *e.g.*, *Webb* v. *R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986) (Missouri law requiring agreements containing arbitration provisions to include a notice to that effect in ten-point capital letters); *N&D Fashions, Inc.* v. *DHJ Indus., Inc.*, 548 F.2d 722, 727 (8th Cir. 1976) (special state law rules for determining whether an arbitration agreement has been made part of the contract when there is a "battle of the forms"); *Medical Dev. Corp.* v. *Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973) (same); *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 997-998 & n.2 (8th Cir. 1972) (Texas law rendering arbitration agreements unenforceable unless they are "concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto"); *Seymour* v. *Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988, 994-995 (D. Minn. 1990) (Minnesota rule making it unlawful to include a mandatory arbitration provision in a franchise agreement); *Cook Chocolate Co.* v. *Salomon Inc.*, 684 F. Supp. 1177, 1182 (S.D.N.Y. 1988) (New York doctrine making it more difficult to incorporate an arbitration agreement by reference than to incorporate other agreements by reference); *Wydel Assocs.* v. *Thermasol, Ltd.*, 452 F. Supp. 739, 742 (W.D. Tex. 1978) (Texas law rendering unenforceable any arbitration agreement purporting to bind a partnership that is not signed by all of the partners); *In re Ferrara S.p.A.*, 441 F. Supp. 778, 781 (S.D.N.Y. 1977), aff'd, 580 F.2d 1044 (2d Cir. 1978) (rule of Italian law ren-

Petitioners' contention (Pet. 14) that "[t]his Court has consistently interpreted the Act's provisions as applying only to the enforcement of an arbitration agreement" is simply wrong. The Court has *never* so held. To the contrary, the Court has consistently observed that Congress's purpose in enacting the FAA was to place arbitration agreements "upon the same footing as other contracts." See, *e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1253 (1989); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 225-226 (1987); *Southland*, 465 U.S. at 16 n.11; *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That purpose applies

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dering unenforceable any arbitration provision that is not signed by both parties directly beneath the provision).

By contrast, petitioners cite only *Eassa Properties* v. *Shearson Lehman Bros.*, 851 F.2d 1301 (11th Cir. 1988), which they properly do not claim to create a conflict among the courts. In a brief footnote that has been correctly characterized as "dicta" (see *Connolly*, 703 F. Supp. at 152 n.9), the *Eassa* court stated simply that "state law governs the question of whether * * * an [arbitration] agreement exists in the first instance." *Id.* at 1304-1305 n.7. This "general observation" (*Connolly*, 703 F. Supp. at 152 n.9) on its face is unobjectionable. This Court has made clear that "state law * * * is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9 (emphasis omitted). On the other hand, to the extent that the *Eassa* court meant that *special* state law principles can be applied to the formation of arbitration contracts, that view is "nonpersuasive." *Connolly*, 703 F. Supp. at 152 n.9. The Eleventh Circuit cited nothing to support that proposition and apparently did not consider a single case interpreting the preemptive scope of the FAA. It thus hardly represents a considered holding that the FAA does not apply to state laws that disparately burden the formation of arbitration agreements.

fully whether the state law burdens enforcement of existing arbitration agreements or instead burdens the formation of new arbitration agreements.

b. The reason that petitioners cannot point to a single case supporting their view is because it is completely contrary to the language of the federal statute. Section 2 of the FAA expressly provides that a written agreement to arbitrate a contractual dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Petitioners' assertion that "the Act applies only to *enforce* an agreement to arbitrate" (Pet. 10; emphasis added) thus ignores the fact that the "validity" and not just the "enforceability" of such an agreement must be tested by general rules of contract interpretation rather than by special rules applicable only to arbitration clauses. The FAA plainly prohibits a state from refusing to recognize the "validity" of an arbitration provision on grounds that do not apply to contract terms generally. Yet that is precisely what the Commissioner has done here.

Furthermore, if the FAA did not apply to the formation of arbitration agreements, then the states would have the power to do indirectly what the federal statute indisputably prohibits them from doing directly—rendering arbitration provisions unenforceable on grounds that do not apply to other contracts. Suppose, for example, that a state wanted to evade the Court's holding in *Southland* that the FAA preempts state statutes that make franchise-related claims non-arbitrable. Under petitioners' proposed interpretation of the FAA, the state need only enact a law entitling it to pass on all franchise agreements in advance and then refuse approval of any agree-

ment that required arbitration of franchise-related claims. Similarly, the states easily could circumvent the numerous cases holding that arbitration agreements may not be revoked for failure to comply with rules of contract formation that apply only to arbitration provisions.[5] All they would need to do is establish a process for reviewing certain categories of contracts and then refuse to approve any arbitration provision that does not comply with their discriminatory contract formation requirements. Because no arbitration agreement that violates the discriminatory state law would ever be "executed," the FAA would not apply.

Thus, as the court of appeals recognized, "[t]o restrict the FAA to existing arbitration agreements would be to allow states to wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts." Pet. App. A-8 (internal quotation marks omitted). This Court has steadfastly refused to countenance such a result in the past. See, *e.g.*, *Southland*, 465 U.S. at 15-16 (rejecting argument that the FAA does not apply in state courts); *id.* at 17 n.11 (rejecting argument that a state's policy of providing special protection for franchisees constitutes a ground that exists at

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[5] Discriminatory rules of contract formation that have been held preempted, but that the states easily could impose as a prerequisite to approving certain kinds of contracts, include the requirement that contracts containing an arbitration provision include a notice to that effect in ten-point type (*Webb*, 800 F.2d at 806-807), the requirement that parties enter into arbitration agreements only upon advice of counsel (*Collins*, 467 F.2d at 997-998 & n.2), and the requirement that both parties indicate their informed consent to an arbitration provision by signing directly beneath it (*Ferrara*, 441 F. Supp. at 780-781).

law or in equity for the revocation of any contract and thus is a legitimate ground under the FAA for refusing to enforce an arbitration provision in a franchise agreement). Petitioners have provided no reason why it should deviate from that sensible course here. See generally *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988) ("courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading").

2. Petitioners argue (Pet. 14-17) that the Motor Vehicle Dealer Licensing Act is not preempted by the FAA because the two statutes are not in conflict. In particular, they assert (*id.* at 16) that "[t]he Virginia statute, as interpreted by the Commissioner, disturbs neither the parties' ability to agree to arbitrate their disputes, nor the right to enforce such an agreement." As the court of appeals held, however,

> [r]equiring arbitration provisions in dealership agreements to be optional rather than nonnegotiable unreasonably burdens the formation of arbitration agreements. If Saturn could not require that Virginia dealers agree to arbitration, it could be forced to contract with dealers who agree to all provisions except arbitration, despite the fact that arbitration is a core part of Saturn's Dealership Agreement. The Federal Arbitration Act does not allow such singular hostility to the formation of arbitration agreements.

Pet. App. A-16 (footnote omitted).

What is more, petitioners ignore the preemption standard clearly enunciated by this Court:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [and therefore is preempted by] this requirement of [the FAA].

Perry, 482 U.S. at 493 n.9 (emphasis in original).[6] There can be no doubt that the Commissioner's requirement that arbitration clauses be offered as options rather than as nonnegotiable conditions of obtaining a franchise is not a state law principle that "arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." Rather, it plainly is a rule that "takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Ibid.* (emphasis added).

3. Petitioners next contend (Pet. 17-21) that because the Virginia statute applies to all forum selec-

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[6] Instead, petitioners take this Court to task for being "less than diligent in recognizing and fully discussing the accepted preemption analysis." See Pet. 16 n.9. This criticism is misguided. The FAA expressly provides that arbitration agreements shall be enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The legislative history of the Act indicates that Congress intended to place arbitration agreements "upon the same footing as other contracts." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). The preemption standard enunciated in *Perry* follows naturally from the FAA's language and legislative history: a state law conflicts with the FAA and therefore is preempted if it places arbitration agreements on a different footing from other agreements. No extended discussion of general preemption principles is necessary to reach this conclusion.

tion clauses it cannot be said to "single out" arbitration and therefore is not preempted by the FAA. This argument completely misunderstands the requirements of the federal statute. This Court has repeatedly emphasized that the crucial inquiry is whether a state statute imposes burdens on arbitration agreements that do not apply to contracts generally. See *Perry*, 482 U.S. at 493 n.9; *Southland*, 465 U.S. at 16 n.11; see also Pet. App. A-13 to A-14. That is precisely what Section 46.1-550.5:27(10) of the Motor Vehicle Dealer Licensing Act does. As interpreted by the Commissioner, the Virginia statute requires that arbitration provisions be converted from mandatory terms into options. It is undisputed that this is not a requirement that applies broadly to all contractual provisions, or even to all provisions in automobile franchise agreements.

Virginia law does not bar parties from making certain provisions of their contracts nonnegotiable. To the contrary, Virginia, like other American jurisdictions, allows each contracting party to determine the terms upon which that party will do business. See Pet. App. A-15. Only with respect to arbitration provisions in automobile franchise agreements has the Commonwealth departed from that general principle of neutrality. Indeed, the Saturn Dealer Agreement itself contains dozens of provisions that, according to the Commissioner, Saturn may insist upon before approving a dealer; the arbitration provision alone must be made optional. Accordingly, as the court of appeals concluded, the Virginia statute "conflicts with the FAA because [it] * * * singles out arbitration provisions as an exception to" Virginia's general contract rules. Pet. App. A-11.

Because the Motor Vehicle Dealer Licensing Act plainly treats arbitration provisions less favorably than Virginia law treats contractual terms generally, the fact that other kinds of forum selection provisions are similarly burdened is irrelevant. The California franchise statute at issue in *Southland* voided *any* contractual term that waived any of the protections of the state statute.[7] That fact did not stop this Court from holding the statute preempted to the extent that it prohibited arbitration provisions. 465 U.S. at 10.[8]

In *Southland*, this Court admonished that it will not tolerate arguments that could "wholly eviscerate" the FAA's purpose of ending efforts by the states to discourage arbitration. 465 U.S. at 17 n.11. Petitioners' contention that the FAA does not apply if

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[7] The wording of the California statute is quite similar to the wording of the Motor Vehicle Dealer Licensing Act. Compare Cal. Corp. Code Ann. § 31512 ("Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.") with Va. Code Ann. § 46.1-550.5:27(10) (manufacturer is required to include language to effect that "[i]f any provision herein * * * denies access to the procedures, forums, or remedies provided for by [the laws or regulations of the state in which the contract is to be performed], such provision shall be deemed to be modified to conform to such laws or regulations * * *.").

[8] Petitioners assert (Pet. 18-19) that *Southland* is inapposite because the Court did not hold that the statute at issue "singled out" arbitration. In fact, however, the *Southland* Court expressly concluded that "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract' * * *." 465 U.S. at 16 n.11 (emphasis in original).

the state burdens arbitration provisions along with a small number of other contractual terms is just such an argument. If accepted, it would enable the states to completely avoid the strictures of the FAA merely by artful statutory drafting. For example, in *Perry*, the Court held that the FAA preempts state statutes that permit wage claims to be brought in state court "without regard to the existence of any private agreement to arbitrate." Under petitioners' approach, the states could circumvent this holding merely by substituting the term "any private forum selection agreement" for the term "any private agreement to arbitrate." Congress could not possibly have intended the FAA to be defeated so easily.

4. Petitioners next contend (Pet. 21-24) that the court of appeals' decision is inconsistent with the congressional intent underlying the federal Dealer's Day In Court Act ("DDCA"), 15 U.S.C. § 1221 *et seq.* The DDCA provides that:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in [federal district court], without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer * * * to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer * * *.

15 U.S.C. § 1222. The purpose of this statute is crystal clear. As the House Report explains:

> *The purpose of the bill * * * is to supplement the antitrust laws* of the United States so as to permit a franchised automobile dealer to bring

> suit for damages * * * for the failure of the automobile manufacturer to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the dealer's franchise. *The bill creates a cause of action where none previously existed* * * *.

H.R. Rep. No. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News 4596, 4596 (emphasis added).

This language makes plain that Congress's sole purpose in enacting the DDCA was to create a new *federal* cause of action to supplement the antitrust laws. Nothing in the wording of the DDCA or its legislative history even arguably suggests, as petitioners assert (Pet. 22), that Congress intended "to prohibit a mandatory waiver of a judicial forum by automobile dealers."[9] Nor can petitioners point to

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[9] In the district court, petitioners contended that DDCA claims are non-arbitrable even if both parties consent. They have subsequently abandoned that argument, and for good reason. Within the last three years, this Court has held that three different statutes, all with language indistinguishable from the DDCA's, do not override the FAA. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) (Securities Act of 1933); *McMahon, supra* (Racketeer Influenced and Corrupt Organizations Act and Securities Exchange Act of 1934); see also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (international antitrust claims are arbitrable).

Even if Congress had wanted to bar arbitration of DDCA claims, that intent could not possibly support the Commissioner's refusal to permit Saturn to require its dealers to arbitrate *non-DDCA* claims, and it therefore could not justify the Commissioner's failure to approve the Saturn Dealer Agreement. As the court of appeals recognized (see Pet. App. A-7 n.2), the question of whether Congress intended all DDCA claims to be non-arbitrable should be determined if and when a dispute under the DDCA arises. The dealer can argue

any support for their contention that the DDCA entitles states to require automobile manufacturers to make arbitration provisions—but no other material terms—optional. Even if there were some evidence that Congress was concerned with mandatory terms in automobile franchise agreements, there is no reason for concluding that any such concern was limited to arbitration provisions.

5. Petitioners conclude by protesting (Pet. 24-27) that a finding of preemption in this case will undermine the substantive dealer protection provisions of Virginia law.[10] They assert (Pet. 27), for example,

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at that time that the DDCA overrides the FAA, and petitioners can file an *amicus curiae* brief in support of that view, but they may not use the DDCA to bootstrap a rule that would burden the arbitration of non-DDCA claims. Cf. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985) (where a case involves some claims that are subject to arbitration and other claims that Congress has excluded from arbitration, the courts have no discretion to refuse to compel arbitration of the arbitrable claims).

[10] In their efforts to equate arbitration with deprivation of substantive rights, petitioners repeatedly raise the specter of *other* manufacturers imposing arbitration provisions on their *existing* dealers as a condition of franchise renewal. Pet. 26 n.14, 27 n.15. Whether or not the FAA permits the unilateral imposition of mandatory arbitration provisions on existing dealers, that issue simply is not presented in this case. As the Fourth Circuit pointed out,

> no automobile dealer is required to contract with [Saturn]. This is a new company, a new product, and a new concept of marketing. Dealers are not required to execute the new agreement in order to continue as dealers under existing conditions. It is only dealers wishing to sell the Saturn automobile who are required to agree to arbitration.

Pet. A-16 n.6. See also *id.* at A-18 ("the mere fact that Saturn requires dealers to agree to its arbitration provisions in order

that "Saturn's challenge, if successful, would render Virginia's dealer protection statutes a nullity by permitting manufacturers to force dealers to waive all rights under the Virginia law." This Court recently has made clear, however, that arguments based on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants [are] far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 109 S. Ct. at 1920. See also *McMahon*, 482 U.S. at 232; *Mitsubishi*, 473 U.S. at 628.

Nothing in the FAA prevents the states from ensuring that parties to arbitration agreements do not waive the substantive protections of state law. If a particular arbitration provision were expressly to do so—and Saturn's most assuredly does not (see C.A. App. 108-109)—the Commissioner would be entitled to refuse to approve the franchise agreement of which it is a part. Similarly, if an arbitration agreement were applied in such a way as to deprive a dealer of substantive rights, the dealer could attempt to revoke the arbitration agreement as uncon-

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to obtain a Saturn dealership does not make its Dealership Agreement non-consensual. If a dealer does not wish to agree to nonnegotiable arbitration provisions, the dealer need not do business with Saturn").

In any event, the answer to petitioners' irrelevant argument is obvious under the FAA. A dealer would be entitled to argue that the unilateral imposition of a new term in an existing agreement is unconscionable in light of the relative bargaining power of dealer and manufacturer. *Rodriguez de Quijas*, 109 S. Ct. at 1921. Because that argument would apply to *all* new terms, it would not disfavor arbitration agreements and would not be inconsistent with the FAA.

scionable. *Rodriguez de Quijas*, 109 S. Ct. at 1921. All that the FAA forbids the states from doing is to assume in advance that *all* arbitration provisions will result in the waiver of substantive rights. That, of course, is precisely what the Commissioner has done here.

Petitioners also assert (Pet. 27 n.16) that "[i]f the Virginia statute is preempted there would be nothing to protect dealers from being coerced into an arbitration agreement which provides that all disputes will be settled by arbitration in Michigan or Japan and under the laws of another state or country." [11] They fail to recognize, however, that nothing in the FAA bars a litigant from attempting to show that a forum-selection clause should be invalidated on the ground that "proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.' But absent such a showing * * * there is no basis for assuming the forum inadequate or its selection unfair." *Mitsubishi*, 473 U.S. at 632-633 (quoting *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

Finally, petitioners suggest (Pet. 26-27) that a finding of preemption will exempt Saturn from oversight by a neutral official. Again, they are mistaken. Just as the Justice Department can continue to police antitrust violations involving the signatories to an arbitration provision and the Securities and Exchange Commission can continue to regulate the se-

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[11] In fact, the Saturn *Dispute Resolution Guide* provides that the arbitration hearing must be held "in the general vicinity of the Dealer's Marketing Area unless the parties otherwise agree." C.A. App. 49-50.

curities industry despite the ubiquity of arbitration agreements in that area, the Commissioner retains the authority to oversee Saturn's treatment of its dealers. If the Commissioner believes that Saturn has violated one of the substantive provisions of the Motor Vehicle Dealer Licensing Act, the FAA will not prevent him from taking appropriate administrative action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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